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No. 98-721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

PLAYERS INTERNATIONAL, INC., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STEVEN P. PERSKIE
SHERRI A. AFFRUNTI
HORN, GOLDBERG, GORNY, PLACKTER, WEISS & PERSKIE
1300 Atlantic Avenue
Suite 500
Atlantic City, New Jersey 08401
(609) 343-7807

W. RANDOLPH TESLIK, P.C.*
TOM W. DAVIDSON
EDWARD J. MCANDREW
AKIN, GUMP, STRAUSS, HAUER & FELD, L.L.P.
1333 New Hampshire Avenue, N.W
Suite 400
Washington, D.C. 20036
(202) 887-4000
**Counsel of Record*

November 25, 1998

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LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Respondent Players International, Inc. is a publicly traded corporation, with wholly owned subsidiaries. The following Respondents are wholly owned subsidiaries of Players International, Inc.: Players Lake Charles, LLC; Players Star Partnership; Southern Illinois Riverboat/Casino Cruises, Inc.

STATEMENT

Contrary to Petitioners' assertion, Respondents do not contend "that the application of Section 1304 to broadcast advertising for lawful commercial casino gambling in States that permit such gambling violates the First Amendment under the commercial speech doctrine . . . ." Pet. at 8. Instead,

Respondents assert that Section 1304 abridges their First Amendment rights to broadcast truthful, non-misleading advertisements for lawful, commercial casino gaming in any State of the United States. Respondents are not otherwise dissatisfied with Petitioners' statements pursuant to Supreme Court Rules 24.1(a), (b), (d), (e), (f) or (g).

ARGUMENT

In two filings before the Court, Petitioners request that the Court deny certiorari in *Greater New Orleans Broadcasting Ass'n v. United States*, No. 98-387, and await the Third Circuit's forthcoming decision in this case before deciding the constitutionality of 18 U.S.C. § 1304. If the Court chooses to exercise certiorari jurisdiction over *Greater New Orleans Broadcasting Ass'n v. United States*, No. 98-387, at this time, then the Court should do likewise in this case and should dispose of both matters on a consolidated basis. Consideration of both cases will present the best opportunity to resolve Section 1304's constitutionality on the strength or weakness of divergent factual records. Consolidation also will comport with this Court's past exercises of certiorari before judgment.

Respondents agree that the Circuits' divergent views on Section 1304's constitutionality are appropriate for this Court's review. *See* Pet. at 12. By consolidating both cases, this Court will have before it two, very different decisions. One upholds the statute; the other invalidates it. One finds the evidentiary record largely irrelevant; the other finds it wholly insufficient. The *Greater New Orleans Broadcasting* petitioners argue that Section 1304's constitutionality is a doctrinal issue that the Fifth Circuit decided incorrectly. *See* Pet. in No. 98-387, at 11-18; Reply in No. 98-387, at 1-2 & n.1. The respondents there, Petitioners here, argue that the *Players* record best illuminates the constitutional issue. *See* Br. in Opp. in 98-387, at 18; Pet. at 12-13.

Considered together, these two cases afford an opportunity for the Court to resolve Section 1304's constitutionality, while

clarifying the government's evidentiary burden in the commercial speech analysis. Respondents concur with the *Greater New Orleans Broadcasting* petitioners that their case was decided incorrectly. Petitioners here presented no evidence in that case sufficient to sustain Section 1304. *See* Pet. at 22-23; Br. in Opp. in No. 98-387, at 9-10 & 18-19. If the Court were to exercise certiorari and agree, then its consideration of *Players* becomes critical to determining whether the government's "more illuminating record," Pet. at 13, can support Section 1304 in light of *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996).

Consolidation also will comport with past instances in which this Court has exercised certiorari before judgment when presented with multiple cases involving the same issues. *See, e.g., New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970); *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10, 12 (1963); *McElroy v. United States*, 361 U.S. 281, 282-83 (1960). In these cases, the Court exercised certiorari before judgment to consolidate one case with another case, pending before the Court, that presented a similar or identical question of constitutional importance. Issuing certiorari and consolidating both cases therefore will be consistent with the Court's past practices.

CONCLUSION

If the Court chooses to resolve the constitutionality of 18 U.S.C. § 1304 at this time, the petitions for a writ of certiorari in this case and in *Greater New Orleans Broadcasting Ass'n v. United States*, No. 98-387, should be granted and those cases should be consolidated.

Respectfully submitted,

W. RANDOLPH TESLIK, P.C.*
TOM W. DAVIDSON
EDWARD J. MCANDREW
AKIN, GUMP, STRAUSS,
HAUER & FELD, L.L.P.
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